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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re MARIA Z. et al., Persons Coming
Under the Juvenile Court Law.

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN AND
FAMILY SERVICES,

Plaintiff and Respondent,

v.

MARISELA S.,

Defendant and Appellant.

B223173

(Los Angeles County
Super. Ct. No. CK58647)

APPEAL from orders of the Superior Court of Los Angeles County. Albert Garcia, Juvenile Court Referee. Affirmed in part, conditionally reversed in part, and remanded with directions.

Roni Keller, under appointment by the Court of Appeal, for Defendant and Appellant.

Andrea Sheridan Ordin, County Counsel, James M. Owens, Assistant County Counsel, Kim Nemoy, Deputy County Counsel, for Plaintiff and Respondent.

Appellant Marisela S. (Mother) appeals juvenile court orders denying her petition for modification and terminating parental rights over her daughters, Maria Z. and Liliana M. Mother contends she presented sufficient evidence to require modification of the prior order denying reunification services and to establish the exception to termination under Welfare and Institutions Code section 366.26, subdivision (c)(1)(B)(i).¹ Mother also contends that Liliana's alleged father had Apache heritage and that the Department of Children and Family Services (DCFS) failed to give the notice required by the Indian Child Welfare Act (25 U.S.C. § 1901 et seq. (ICWA)). We reject Mother's contentions with respect to her section 388 petition and the section 366.26 exception. However, we conditionally reverse the order terminating parental rights as to Liliana and remand for compliance with ICWA.

FACTUAL AND PROCEDURAL BACKGROUND

Mother and her children came to the attention of DCFS in March 2005, when both she and a newborn daughter tested positive for amphetamine. That child and her siblings, a seven-year-old girl and a less than one-year-old boy, were the subject of a prior dependency proceeding. Mother's parental rights over the baby girl and her son were terminated in December 2006, a decision this Court affirmed by opinion and order dated June 21, 2007.²

In July 2006, while the earlier proceedings were pending, Mother gave birth to another girl, Maria. An agreement was reached between Mother and DCFS under which Mother could retain custody, contingent on testing clean and staying

¹ Undesignated statutory references are to the Welfare and Institutions Code.

² Mother's oldest daughter was placed with her father.

in the inpatient drug treatment program she was then attending.³ However, in October 2006, Mother relapsed and Maria was detained and placed with her maternal grandmother, who was in the process of adopting two of the older siblings. Mother did not contest the section 300 petition alleging that her use of amphetamine and methamphetamine intermittently interfered with her ability to provide care for Maria.⁴

Mother reentered a substance abuse treatment program in August 2006 and was drug free for a substantial period thereafter. She began visiting Maria almost daily and progressed to overnight weekend visits. In September 2007, she gave birth to Liliana while residing in a sober living home. She kept custody of Liliana under a voluntary family maintenance agreement with DCFS. In November 2007, Maria was returned to Mother's custody under DCFS supervision.

After the return of Maria, reports of Mother's progress were initially promising. She was caring for the girls appropriately, regularly testing negative for drugs and attending Narcotics Anonymous meetings. In March 2008, however, Mother began consistently missing drug tests. When the caseworker came for home visits in April and May, she found Mother absent and the maternal grandmother caring for Maria and Liliana, along with the two older siblings.⁵ In June, Mother was arrested for being in possession of a controlled substance and

³ As discussed in the prior opinion, this was the first time Mother seriously attempted to address her substance abuse problem. She had tried, and failed, to achieve sobriety through brief attendance at two prior programs.

⁴ The court found that ICWA did not apply to Maria.

⁵ The caseworker noted that on one of those occasions, the maternal grandmother appeared overwhelmed. The house was messy and the children were not dressed or were wearing dirty clothes and their diapers were soiled.

being under the influence.⁶ In August, the caseworker heard from Liliana's paternal grandmother that Mother had relapsed and had begun leaving Liliana, and sometimes Maria, in the grandmother's care. On August 21, 2008, DCFS detained Maria and Liliana, initially to foster care and then with a paternal relative, Laura F. On the day the children were detained, they were dirty, their diapers were soiled and there appeared to be no formula for them. After the children were detained, Mother admitted she had relapsed and immediately began attending a drug treatment program and visiting the children. In late September 2008, however, Mother was incarcerated.

At the August 2008 detention hearing, Mother identified Christopher M. as Liliana's father, but conceded they were never married, they had not lived together at the time of the child's birth and he had signed no papers admitting paternity. Christopher's mother stated that there was possible Apache heritage in the family through her father. The court instructed her to provide information about the family to the caseworker and ordered DCFS to give notice to the Apache tribes.

Due to Mother's history and the multiple opportunities afforded her to resolve her substance abuse problem, DCFS recommended no further reunification services.⁷ At the December 2008 dispositional hearing, the court ordered no reunification services for Mother pursuant to section 361.5, subdivisions (b)(10), (11) and (13), and set a section 366.26 hearing for termination of parental rights.⁸

⁶ It does not appear that DCFS was aware of Mother's arrest for several months.

⁷ Mother did not contest jurisdiction, which was based on her history of substance abuse and failure to comply with court orders and the voluntary service agreement.

⁸ Section 361.5. subdivisions (b)(10) and (11) permits the court to deny reunification services to a parent if the court has ordered termination of reunification services or parental rights in connection with a sibling or half-sibling and the parent "has not subsequently made a reasonable effort to treat the problems that led to removal of the
(*Fn. continued on next page.*)

The court allowed visitation “[i]f Mother can locate someone, DCFS approved, to transport [children] to mother’s place of incarceration and the distance is not excessive.”⁹

The section 366.26 hearing was continued several times while DCFS attempted to locate and give notice to Liliana’s alleged father, Christopher, and to complete the adoption home study. The adoption home study was approved in December 2009, by which time the girls had been living with the prospective adoptive mother, Laura F., for a year and a half. In January 2010, the caseworker reported that the girls had developed “a positive bond and attachment” to Laura and appeared to be “thriving” in her home.

Christopher was located in prison in late 2009. He sent DCFS a letter stating he had been misled by Mother and the paternal grandmother to believe he would be unable to have custody of his daughter because he had a record. He said he wished to be part of Liliana’s life and wanted to know his rights as a father. In January 2010, Christopher waived his appearance at the section 366.26 hearing. DCFS heard nothing further from him.

On March 9, 2010, the day the section 366.26 hearing was held after multiple continuances, Mother filed a section 388 petition seeking reunification services. She stated she would be released in July 2010. She presented evidence

sibling or half sibling.” Subdivision (b)(13) permits denial of reunification services if “the parent . . . has a history of extensive, abusive, and chronic use of drugs or alcohol and has resisted prior court-ordered treatment for this problem during a three-year period immediately prior to the filing of the petition that brought [the] child to the court’s attention, or has failed or refused to comply with a program of drug or alcohol treatment described in the case plan . . . on at least two prior occasions, even though the programs identified were available and accessible.”

⁹ The parties do not dispute that no visitation took place while Mother was incarcerated.

that while incarcerated, she had enrolled herself in and completed programs geared toward addressing case issues, including parenting classes, a substance abuse program and individual counseling.

The court held a combined hearing on the section 388 petition and termination. Mother, who was in custody at the time of the hearing, was brought to court and testified she had been incarcerated on two separate occasions, from September 2008 to June 2009 and from October 2009 to the present. She anticipated release in July 2010. She confirmed participating in parenting classes, a substance abuse program and individual counseling while incarcerated, and said she had also attended a drug program and had drug tested during her period of release between June and October 2009. She stated she had been with the girls during “every weekend” during that period, when they were visiting their maternal grandmother.¹⁰ According to Mother, during these visits, she fed and bathed the girls, read to them, took them to the park, and sang, played games and watched television with them. She said the girls called her “mommy,” wanted her to hold them and cried when she left. She said she had not used drugs since December 2008, despite their availability even in prison. She planned to continue to address substance abuse issues when she was released.

Mother, joined by the girls’ fathers, asked the court to grant the section 388 petition or apply the exception to termination of parental rights and adoption of section 366.26, subdivision (c)(1)(B)(i). DCFS, joined by counsel for the children, argued the petition should be denied and the girls freed for adoption. The court

¹⁰ In June 2009, the caseworker had reported that Mother was on probation and had not yet visited the children. The August 2009 report stated that Mother had not visited the children. The next report, dated December 8, 2009, stated that Mother had not visited or called the children in several months. There is no indication in these reports that Laura was leaving the girls with their maternal grandmother on weekends.

denied the petition and terminated parental rights. The court found no basis for reviving reunification services and found by clear and convincing evidence that the girls were likely to be adopted. Mother appealed.

DISCUSSION

A. Section 388 Petition

Section 388 provides in pertinent part: “(a) Any parent . . . may, upon grounds of change of circumstance or new evidence, petition the court in the same action in which the child was found to be a dependent child of the juvenile court . . . for a hearing to change, modify, or set aside any order of court previously made or to terminate the jurisdiction of the court. . . . [¶] . . . [¶] (d) If it appears that the best interests of the child may be promoted by the proposed change of order . . . [or] termination of jurisdiction . . . , the court shall order that a hearing be held” A section 388 petition may be filed and heard at any time, up to and including the time of the section 366.26 hearing. (*In re Marilyn H.* (1993) 5 Cal.4th 295, 309.) However, once the reunification period is over, a presumption arises that “continued care [under the dependency system] is in the best interest of the child.” (*Id.* at p. 306.) At that point, the burden is on the parent to “rebut that presumption by showing that circumstances have changed that would warrant further consideration of reunification.” (*Ibid.*) If imposition of such burden seems unduly harsh, “[i]t must be remembered that up until the time the section 366.26 hearing is set, the parent’s interest in reunification is given precedence over the child’s need for stability and permanency. This could be for a period as long as 18 months. Another four months may pass before the section 366.26 hearing is held. While this may not seem a long period of time to an adult, it can be a lifetime to a young child. Childhood does not wait for the parent to become adequate. [Citation.]” (*Marilyn H., supra*, at p. 310.)

Among the factors the court considers in determining the minor's best interests for purposes of undoing a prior order and reviving reunification services are, "the seriousness of the reason for the dependency in the first place" (*In re Kimberly F.* (1997) 56 Cal.App.4th 519, 530-531); "the strength of the existing bond between the parent and child" compared to "the strength of [the] child's bond to his or her present caretakers, and the length of time a child has been in the dependency system in [relation] to the parental bond" (*id.* at p. 531); and "the nature of the change, the ease by which the change could be brought about, and the reason the change was not made before" (*ibid.*). "[E]ach child's best interests would necessarily involve eliminating the specific factors that required placement outside the parent's home" (*In re Angel B.* (2002) 97 Cal.App.4th 454, 463-464.) Whether to grant the petition "is addressed to the sound discretion of the juvenile court and its decision will not be disturbed on appeal in the absence of a clear abuse of discretion." (*In re Jasmon O.* (1994) 8 Cal.4th 398, 415.)

Here, the reason for the dependency proceedings was Mother's long-term drug abuse, a very serious problem that prevented her from properly caring for her daughters and that had already led to the loss of custody or parental rights over three older siblings. Evidence of a mother/child bond was weak. By the time Mother filed the section 388 petition in March 2010, her younger girls had spent the majority of their lives outside her care. Maria, who was nearly four at the time of the hearing, had spent a mere 12 months in Mother's custody -- three months following her birth and from November 2007 to August 2008. Liliana, who was two and a half at the time of the hearing, had spent only eleven months in Mother's custody -- from her birth in September 2007 until August 2008. Moreover, even when the girls were in Mother's custody, it did not always appear that they were in her "care." In the spring and summer of 2008, when Mother began using drugs again, there was evidence that she left the girls to be cared for by their

grandmothers on multiple occasions, despite the burden this placed on the maternal grandmother who was already caring for two of Mother's older children. After August 2008, neither girl spent any significant time with Mother, primarily due to Mother's repeated incarcerations. On the other hand, the girls had been in their prospective adoptive mother's home -- receiving good care and thriving -- for almost all of the 19 months that followed their detention. With respect to her substance abuse problem, Mother presented evidence that she had not used drugs for a substantial period. However, the majority of that time had been spent in the controlled environment of prison, where drugs were difficult to come by and programs were readily available. Given Mother's past history of making progress during inpatient treatment followed by a relapse when she was out on her own, the court had no reason to believe her progress would continue when she was released. In sum, the evidence presented did not support the conclusion that further reunification efforts would be in the girls' best interests, and the court did not abuse its discretion in denying the petition for modification.

B. Section 366.26 Exception

Once a court determines that the child's parents "are, and are likely to remain, unfit to care for the child[ren]," the last phase of dependency begins -- implementation of a permanent plan under section 366.26. (*In re David H.* (1995) 33 Cal.App.4th 368, 377.) Section 366.26, subdivision (c)(1) requires the juvenile court to terminate parental rights and order the dependent child placed for adoption if it finds by clear and convincing evidence that the child is likely to be adopted, unless it finds "a compelling reason for determining that termination would be detrimental to the child" due to the existence of certain specified exceptional circumstances. (*Id.*, subd. (c)(1)(B).) Once the court determines that a child is likely to be adopted, the burden is on the parent to demonstrate that termination of

parental rights would be detrimental to the child under one of the exceptions listed in section 366.26, subdivision (c)(1). (*In re Lorenzo C.* (1997) 54 Cal.App.4th 1330, 1343-1345.)

Mother contends the evidence established that the exception contained in section 366.26, subdivision (c)(1)(B)(i) applied. Subdivision (c)(1)(B)(i) provides an exception to termination of parental rights where “[t]he parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship.” The subdivision (c)(1)(B)(i) exception is established where there is evidence of a significant, positive emotional attachment of the child to the parent. (*In re Derek W.* (1999) 73 Cal.App.4th 823, 827; *In re Elizabeth M.* (1997) 52 Cal.App.4th 318, 324.) Courts recognize that interaction between parent and child will almost always confer some “incidental benefit” to the child. (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 575.) However, to support a finding of “benefit” under section 366.26, subdivision (c)(1)(B)(i), the parent-child relationship must “promote[] the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents.” (*In re Autumn H., supra*, at p. 575.) Only “[i]f severing the natural parent/child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed,” can the preference for adoption be overcome and parental rights maintained. (*Ibid.*)

The exception to termination of parental rights and adoption “must be examined on a case-by-case basis, taking into account the many variables which affect a parent/child bond. The age of the child, the portion of the child’s life spent in the parent’s custody, the ‘positive’ or ‘negative’ effect of interaction between parent and child, and the child’s particular needs are some of the variables which logically affect a parent/child bond.” (*Autumn H., supra*, 27 Cal.App.4th at pp. 575-576.) Day-to-day contact is not an absolute requirement, but the type of

relationship necessary to support the section 366.26, subdivision (c)(1)(B)(i) exception, is “a relationship characteristically arising from day-to-day interaction, companionship and shared experiences.” (*In re Casey D.* (1999) 70 Cal.App.4th 38, 51.) To establish the exception in section 366.26, subdivision (c)(1)(B)(i), “the parents must do more than demonstrate ‘frequent and loving contact’ [citation], an emotional bond with the child, or that the parents and child find their visits pleasant. [Citation.] Rather, the parents must show that they occupy ‘a parental role’ in the child’s life.” (*In re Andrea R.* (1999) 75 Cal.App.4th 1093, 1108-1109, quoting *In re Beatrice M.* (1994) 29 Cal.App.4th 1411, 1418-1419.)

We review the court’s section 366.26 finding to determine whether substantial evidence supports it, construing the evidence most favorable to the prevailing party and indulging in all legitimate and reasonable inferences to uphold the court’s ruling. (*In re Misako R.* (1991) 2 Cal.App.4th 538, 545.)

The primary evidence Mother relied on to support the section 366.26, subdivision (c)(1)(B)(i) exception, was her testimony concerning the weekend visits with the girls she alleged took place in the four months between June and October 2009 that separated her two periods of incarceration. Mother contends that visits occurred every weekend during this period and that she spent the time feeding and bathing the girls, as well as playing with them and reading to them, and that they called her “mommy” and cried when the visits were over. Her testimony was contradicted by the caseworker’s reports which did not indicate the girls spent any significant time outside of Laura’s custody and specifically stated that there was no visitation by Mother during this period. Moreover, even if Mother’s claim of having spent every weekend with the girls from June to October 2009 were true, this would establish nothing more than the “frequent and loving contact” or “pleasant” visits that are deemed insufficient to establish the exception. Mother has not had day-to-day interaction with the girls since August 2008 and,

based on the evidence of relapse as early as June 2008, has not played a parental role for an even longer time. The girls, only three and four now, were very young when they were detained and spent only a small percentage of their lives with Mother. The evidence did not establish that continuing the relationship with Mother would outweigh the well-being the girls would gain by having a stable home with the adoptive mother. The court's ruling was supported by substantial evidence.

C. ICWA Notice

ICWA was passed by Congress to cure “abusive child welfare practices that resulted in the separation of large numbers of Indian children from their families and tribes through adoption or foster care placement, usually in non-Indian homes.” (*Mississippi Choctaw Indian Band v. Holyfield* (1989) 490 U.S. 30, 32.) Under ICWA, an Indian child is “any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe.” (25 U.S.C. § 1903(4); see *In re B.R.* (2009) 176 Cal.App.4th 773, 781-783 [in case of doubt whether a child is eligible for membership, determination is made by tribe, not juvenile court or DCFS].) “When a court ‘knows or has reason to know that an Indian child is involved’ in a juvenile dependency proceeding, a duty arises under ICWA to give the Indian child’s tribe notice of the pending proceedings and its right to intervene.” (*In re Shane G.* (2008) 166 Cal.App.4th 1532, 1538, quoting 25 U.S.C. § 1912(a); accord, *In re Alice M.* (2008) 161 Cal.App.4th 1189, 1195.) “Notice must be sent when there is reason to believe the child may be an Indian child. [Citation.] ‘[T]he juvenile court needs only a suggestion of Indian ancestry to trigger the notice requirement.’” (*In re Francisco W.* (2006) 139 Cal.App.4th 695, 703, quoting *In re Nikki R.* (2003) 106 Cal.App.4th 844, 848; accord, *In re*

Samuel P. (2002) 99 Cal.App.4th 1259, 1266-1267, quoting *In re Desiree F.* (2000) 83 Cal.App.4th 460, 471 [“[T]he Indian status of the child need not be certain to invoke the notice requirement.”].)

Here, Mother identified Christopher as Liliana’s biological father, and Christopher’s mother stated that her family had Apache heritage.¹¹ The court instructed DCFS to give notice to the Apache tribes. The record contains no evidence that such notice was given. In accordance with recognized procedures, the order terminating parental rights over Liliana must be conditionally reversed and the matter remanded for the limited purpose of ensuring compliance with ICWA. (See, e.g., *In re Francisco W.*, *supra*, 139 Cal.App.4th at pp. 703-711; *Tina L. v. Superior Court* (2008) 163 Cal.App.4th 262, 267-269; *In re Marinna J.* (2001) 90 Cal.App.4th 731, 740.) The termination order will be reinstated if no Indian tribe intervenes after proper notice is given. (*Ibid.*)

Citing *In re Daniel M.* (2003) 110 Cal.App.4th 703, respondent contends no notice was required because Christopher was an alleged father only and never established paternity. The court in *Daniel M.* held that an alleged father has no standing to raise the failure to comply with ICWA on appeal because 25 U.S.C. section 1914 grants standing only to the child, the tribe, an Indian custodian or a “parent,” and an alleged father does not meet the definition of “parent.” (*In re Daniel M.*, *supra*, at pp. 707-709.) The issue here is not standing -- Mother clearly has standing under 25 U.S.C. section 1914 to challenge orders made without ICWA compliance -- but whether there is any reason to believe Liliana “may be” an Indian child under 25 U.S.C. section 1903, which requires only “a suggestion of Indian ancestry.” (*In re Francisco W.*, *supra*, 139 Cal.App.4th at p. 703.) The

¹¹ When subsequently contacted by DCFS, Christopher identified himself as Liliana’s father.

court implicitly found the information provided by Mother and Christopher's mother sufficient to trigger the ICWA notice requirement. DCFS did not challenge that finding below and respondent does not challenge it here. It is true that neither Mother nor Christopher raised any issues concerning ICWA notice in the proceedings below. However, "[t]he generally accepted rule in dependency cases is that the forfeiture doctrine does not bar consideration of ICWA notice issues on appeal." (*In re Alice M.*, *supra*, 161 Cal.App.4th at p. 1195.) "The notice requirements serve the interests of the Indian tribes 'irrespective of the position of the parents' and cannot be waived by the parent." [Citation.]" (*Ibid.*, quoting *In re Justin S.* (2007) 150 Cal.App.4th 1426, 1435.)

DISPOSITION

The order terminating parental rights over Liliana is conditionally reversed and the matter is remanded to the juvenile court with directions to instruct DCFS to provide the Apache tribes with ICWA notice. If, after receiving notice, no tribe intervenes, the juvenile court shall reinstate the order terminating parental rights. If a tribe claims Liliana as an Indian child, the juvenile court shall proceed in conformity with ICWA. In all other respects, the court's orders are affirmed.

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MANELLA, J.

We concur:

EPSTEIN, P. J.

SUZUKAWA, J.